Chapter 7: Pretrial Proceedings in Delinquency Cases

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In this chapter. . .

This chapter contains information on common pretrial issues in juvenile delinquency cases, including motion practice, determining the admissibility of evidence gathered by police, jury trial demands, and procedures to protect witnesses. The following issues are discussed:

- What information and evidence must the parties provide one another before trial, and what information and evidence may the parties obtain after filing a motion?
- What are the technical rules for filing written motions in a delinquency case, and when is a court required to conduct an evidentiary hearing?

- What are the constitutional, statutory, and court-rule requirements for the admissibility of identification testimony, juvenile confessions, and evidence seized by police?
- What are the requirements to determine a juvenile's competence to "stand trial"?
- What are the requirements to raise an alibi or insanity defense?
- When are the parties entitled to a jury trial?
- When may the court close delinquency proceedings, order special protections for a witness, or order a change of venue?

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and "traditional waiver" proceedings, and to Subchapter 6.900, which govern "automatic waiver" proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook:Delinquency & Criminal Proceedings* (MJI, 1998).

7.1 Pretrial Conferences

MCR 3.922(D) allows the court to direct the parties to appear at a pretrial conference to settle all pretrial matters. Except as otherwise provided in or unless inconsistent with the rules of Subchapter 3.900, the scope and effect of a pretrial conference are governed by MCR 2.401.

A pretrial conference may be held at any time after the commencement of the action. The court must give reasonable notice of the scheduling of the conference. MCR 2.401(A).

In *People v Grove,* 455 Mich 439, 464–65 (1997), the Court found no abuse of the trial court's discretion in refusing to accept the defendant's guilty pleas, made pursuant to a plea agreement, where the pleas were tendered after the "plea cutoff date" in a pretrial scheduling order. The trial judge may refuse to accept the defendant's plea "pursuant to the rules," which was interpreted to include MCR 2.401(B)(1)(b), governing pretrial scheduling orders.

7.2 Discovery

A. As of Right

MCR 3.922(A)(1) lists materials that are discoverable as of right in juvenile delinquency proceedings. MCR 3.922(A)(1)(a)–(h) state:

> "(1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:
>
> (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;
>
> (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;
>
> (c) the names of prospective witnesses;
>
> (d) a list of all prospective exhibits;
>
> (e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;
>
> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, which are relevant to the subject matter of the petition;
>
> (g) the results of any lineups or showups, including written reports or lineup sheets; and
>
> (h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories."

B. By Motion

MCR 3.922(A)(2) states as follows:

*See also MCR 3.923(A)(3), which allows the court to serve process on additional witnesses and order production of additional evidence. This rule is discussed in Section 9.12.

> "On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery."*

"Depositions may only be taken as authorized by the court." MCR 3.922(A)(3).

MCR 3.922(A)(4) provides that a failure to comply with MCR 3.922(A)(1) or (2) may result in sanctions set forth in MCR 2.313.

7.3 Motion Practice

Motion practice in delinquency cases is governed by MCR 2.119. MCR 3.922(C).

Time requirements for written motions under MCR 2.119. Unless the court sets a different time period, written motions must be filed at least seven days before the hearing on the motion, and any response must be filed at least three days before the hearing. MCR 2.119(C)(4). Unless a different period is provided by rule or set by the court for good cause, written motions and accompanying papers (other than ex-parte motions) must be served on the opposing party at least nine days before the time set for hearing if service is by mail. MCR 2.119(C)(1)(a). Service by mail is complete at the time of mailing. MCR 2.107(C)(3). If service is by delivery as defined in MCR 2.107(C)(1) and (2), the motion must be served on the opposing party at least seven days before the time set for hearing. MCR 2.119(C)(1)(b).

Unless a different period is provided by rule or set by the court for good cause, any response to a motion must be served at least five days before the hearing if service is by mail, or at least three days before the hearing if service is by delivery. MCR 2.119(C)(2)(a)–(b).

If the court sets a different time period for serving a motion or response, the court's authorization must be in writing on the notice of hearing or in a separate order. MCR 2.119(C)(3).

In criminal proceedings, a trial court has discretion to entertain a motion to suppress evidence at trial. In *People v Ferguson,* 376 Mich 90, 94 (1965), the Michigan Supreme Court stated that "except under special circumstances the trial court may, within its sound discretion, entertain at trial a motion to suppress." The Court declined in that case to define the circumstances under which a trial court may exercise its discretion to entertain a motion to suppress evidence at trial but gave as an example a case

in which facts concerning an allegedly illegal seizure are not known sufficiently in advance of trial. *Id.* at 94–96. In *Ferguson,* the Court found no abuse of discretion in the trial court's refusal to entertain a motion to suppress evidence (a gun) that was allegedly the fruit of an illegal search and seizure. The defendant did not claim that he was unaware of the factual circumstances surrounding the allegedly illegal seizure prior to trial. Moreover, the defendant was identified at the preliminary examination as having wielded the gun, and the warrant and information referred to the gun. See also *People v Davis,* 52 Mich App 59, 60 (1974) (trial court did not err in refusing to conduct an evidentiary hearing during trial because defendants and defense counsel knew well before trial that a weapon had been seized during defendants' arrest), and *People v Williams,* 23 Mich App 129, 130–31 (1970) (where defendant was aware of all facts surrounding his arrest and the challenged search and seizure, defendant waived the issue of the legality of the search and seizure by failing to move to suppress the evidence before trial). Defendants have the responsibility to inform defense counsel of facts surrounding the acquisition of evidence. *People v Soltis,* 104 Mich App 53, 55–58 (1981), modified on other grounds 411 Mich 1037 (1981) (defendant had the responsibility to inform defense counsel that he had given a written statement to police).

Hearings on the admissibility of confessions must be conducted out of the hearing of the jury. MRE 104(c). Hearings on other preliminary matters must be conducted outside the jury's presence where the interests of justice require or, when the accused is a witness, if he or she so requests. *Id.*

Required form of written motions. Unless made during a hearing or trial, a motion must be in writing, must state with particularity the grounds and authority on which it is based, must state the relief or order sought, and must be signed by the attorney or party filing the motion. MCR 2.119(A).

A court may, in its discretion, dispense with or limit oral arguments on motions and may require the parties to file briefs in support of and in opposition to a contested motion. MCR 2.119(E)(3). MCR 2.119(A)(2) requires a motion or response that presents an issue of law to be accompanied by a brief citing the authority on which it is based.

The formal requirements of motions and accompanying briefs are contained in MCR 2.119(A)(2).* That rule states, in part:

> "Except as permitted by the court, the combined length of any motion and brief, or of a response and brief, may not exceed 20 pages double spaced, exclusive of attachments and exhibits. Quotations and footnotes may be single-spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point type. A copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must

*Many jurisdictions have local court rules governing the form of motions.

> be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten."

Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. *People v Leonard,* 224 Mich App 569, 578–79 (1997).

Requirements for supporting affidavits. Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. MCR 2.114(B)(1). However, when a motion is based on facts not appearing on the record, the trial court has discretion to require affidavits. MCR 2.119(E)(2). Affidavits must conform to the requirements of MCR 2.113(A) (an affidavit must be verified by oath or affirmation) and MCR 2.119(B). Pursuant to MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> "(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> "(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

Affidavits must be served on the opposing party within the time limits for written motions. See *Hubka v Pennfield Twp,* 197 Mich App 117, 119 (1992), rev'd on other grounds 443 Mich 864 (1993) (trial court erred by relying on an affidavit produced on the day of the hearing).

When evidentiary hearings must be conducted. In *People v Wiejecha,* 14 Mich App 486, 488 (1968), the Court of Appeals stated:

> "The right to a separate evidentiary hearing when an attack on the admissibility of evidence is made on constitutional grounds was pronounced by the United States Supreme Court in *Jackson v Denno,* [378 US 368 (1964)] . . . .
>
> "The defendant has a right to have an evidentiary hearing on his motion [to suppress evidence]. The defendant has this right in every case, jury and non-jury, if such a hearing is requested."

However, in *People v Reynolds,* 93 Mich App 516, 519 (1979), where the constitutionality of an identification procedure was challenged, the Court of Appeals concluded that an evidentiary hearing must be conducted whenever

a defendant challenges the admissibility of evidence on constitutional grounds *and* there is any factual dispute regarding the issue. In *People v Johnson,* 202 Mich App 281, 285–87 (1993), the Court of Appeals ruled that there is no right to an evidentiary hearing on the issue of the constitutionality of an identification procedure *if there is no factual support for the challenge*. Therefore, a judge need not hold an evidentiary hearing if no factual dispute exists. See also *Bielawski v Bielawski,* 137 Mich App 587, 592 (1984) (trial court should first determine whether contested factual questions exist before conducting an evidentiary hearing in a child custody case).

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar) and MCR 3.903(A)(10) ("formal calendar" means judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or preliminary hearing).

Motions for rehearing or reconsideration. Except as provided in MCR 2.604(A), a motion for rehearing or reconsideration of the decision on a motion must be filed and served within 14 days of the entry of the order disposing of the motion. MCR 2.119(F)(1). Under MCR 2.604(A), an order is "subject to revision before entry of final judgment." "[T]he 14-day time limit on motions for reconsideration contained in MCR 2.119(F)(1) should not deter a trial court from correcting its interim orders whenever legally appropriate." Dean & Longhofer, Michigan Court Rules Practice (4th ed), §2604.2, p 351. No response to the motion may be filed and no oral argument is allowed unless the court directs otherwise. MCR 2.119(F)(2). The standard for granting or denying motions for rehearing or reconsideration is set forth in MCR 2.119(F)(3), which states as follows:

> "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

In *People v Turner,* 181 Mich App 680, 683 (1989), the Court of Appeals stated that the rehearing procedure contained in MCR 2.119(F) "allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties."

7.4 Identification Procedures

A. Fingerprinting and Photographing

*See Section 25.11.

A request to fingerprint or photograph a juvenile may be made when police are conducting investigations of other matters and are seeking to link the juvenile, who is in court custody, to or exclude the juvenile from commission of other offenses. MCR 3.923(C) states that "[t]he court may permit fingerprinting or photographing, or both, of a minor concerning whom a petition has been filed. Fingerprints and photographs must be placed in the confidential file, capable of being located and destroyed on court order." This rule should not be confused with the fingerprinting requirements contained in MCL 28.243 and MCR 3.936(B), which make it mandatory for the police to take fingerprints of all juveniles who are arrested or taken into custody for certain offenses.*

B. Court-Ordered Lineups or Showups

If a complaint or petition is filed with the Family Division against a juvenile alleging violation of a criminal law or ordinance, the court may, at the request of the person submitting the petition or complaint, order the juvenile to appear at a place and time designated by the court for identification by another person, including a corporeal lineup. MCL 712A.32(1) and MCR 3.923(D).*

If the court orders the juvenile to appear for such an identification proceeding, the court must notify the juvenile and the juvenile's parent, guardian, or legal custodian:

- that the juvenile has the right to consult with an attorney and have an attorney present during the identification proceeding, and
- that if the juvenile and the juvenile's parent, guardian, or legal custodian cannot afford an attorney, the court will appoint an attorney for the juvenile if requested on the record or in writing by the juvenile or the juvenile's parent, guardian, or legal custodian. MCL 712A.32(2) and MCR 3.923(D).

If the juvenile and his or her parent, guardian, or legal custodian fail to appear in response to a court order, contempt proceedings may be instituted. The court may issue a bench warrant for the juvenile's apprehension. MCR 3.606(A)(2).

C. Constitutional Requirements

Right to counsel. There is a federal constitutional right to counsel at a corporeal lineup. *United States v Wade*, 388 US 218, 237 (1967) and *Gilbert*

v California, 388 US 263 (1967). The general rule in Michigan is that the right to counsel applies to both corporeal and photographic identification procedures and that the right attaches when the accused is taken into custody. *People v Anderson,* 389 Mich 155, 169, 188 (1973) and *People v Kurylczyk,* 443 Mich 289, 301–02 (1993). See also *In re Jackson,* 46 Mich App 764, 769–70 (1973) (juvenile's constitutional right to counsel was not violated where a showup was conducted before counsel was retained but with "standby" appointed counsel present).

There are three exceptions to the right to counsel at identification procedures:

- the "intelligent" waiver of counsel by an accused;
- emergency situations requiring immediate identification; and
- prompt on-the-scene corporeal identifications within minutes of the crime. *Anderson, supra* at 187, n 23.

The police may conduct on-the-scene identifications without the presence of counsel unless the police have strong evidence that the person they stopped committed the crime. Strong evidence exists where the accused has confessed or presented the police with highly distinctive evidence of the crime, a highly distinctive personal appearance, or close proximity in place and time to the scene of the crime. *People v Turner,* 120 Mich App 23, 36–37 (1982). But see *People v Winters,* 225 Mich App 718, 726–28 (1997) ("strong evidence" standard from *Turner, supra* is too difficult for police officers to apply; on-the-scene confrontations are generally permissible).

Counsel is required at a photographic showup when the accused is in custody, but not when police have not yet arrested the accused or focused their investigation on the accused alone. *Kurylczyk, supra* at 301–02.

Burden of proof. A criminal defendant has the burden of establishing that his or her right to counsel was violated. *People v Morton,* 77 Mich App 240, 244 (1977). The prosecuting attorney has the burden of showing that the defendant waived his or her right to counsel. *Wade, supra* 388 US at 237 (an intelligent waiver of the right to counsel must be shown), and *People v Daniels,* 39 Mich App 94, 96–97 (1972) (prosecutor proved by clear and convincing evidence that the defendant voluntarily, knowingly, and intelligently waived his right to assistance of counsel at a lineup). If counsel was not present, the prosecutor must establish that the procedure was not unduly suggestive. If counsel was present, the defendant has the burden of proving that the procedure was unduly suggestive. *People v Young,* 21 Mich App 684, 693–94 (1970).

If the court finds a violation of the right to counsel or that a pretrial identification procedure was unduly suggestive, in-court identification of the defendant at trial is inadmissible as the fruit of the illegal procedure unless the prosecution establishes by clear and convincing evidence that the

in-court identification is based upon observations of the suspect other than the illegal pretrial identification. *Wade, supra,* 388 US at 240, *Anderson, supra,* and *People v Gray,* 457 Mich 107, 115 (1998).

Impermissible suggestiveness and due-process limitations. Substantive evidence concerning any "pre-indictment" identification procedure is inadmissible if the procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it amounts to a denial of due process. *Stovall v Denno,* 388 US 293, 302 (1967), *Anderson, supra* at 168–69, *Kurylczyk, supra* at 302–11 (photographic identifications).

Physical differences among a suspect and other lineup participants do not alone establish impermissible suggestiveness. *People v Benson,* 180 Mich App 433, 438 (1989), rev'd on other grounds 434 Mich 903 (1990). Such differences are significant only when apparent to the witness and when they serve to substantially distinguish the accused from the other participants. *People v James,* 184 Mich App 457, 466 (1990), vacated on other grounds 437 Mich 988 (1991). See also *Kurylczyk, supra* at 304–05, 311–14 (appearance of the accused in a lineup wearing the same clothes as allegedly worn during the commission of the offense does not automatically render a procedure impermissibly suggestive).

Where the witness has failed to identify the accused in a pretrial identification procedure, a later confrontation during a preliminary examination will not be held to be impermissibly suggestive per se. *People v Barclay,* 208 Mich App 670, 675–76 (1995) and *People v Whitfield,* 214 Mich App 348, 351 (1995) (confrontation during "traditional waiver" hearing).

The suggestiveness of an identification procedure is determined by considering the totality of the circumstances surrounding the procedure. *Stovall, supra* 388 US at 301–02 and *People v Lee,* 391 Mich 618, 626 (1974). In ascertaining whether a pretrial identification procedure is impermissibly suggestive, a court must look to the totality of the circumstances, especially the time between the criminal act and the procedure, and the duration of the witness's contact with the perpetrator during commission of the offense. *People v Johnson,* 58 Mich App 347, 352–55 (1975), and *Neil v Biggers,* 409 US 188, 199 (1972).

Consequences of violation. If the pretrial identification procedures are impermissibly suggestive or conducive to irreparable misidentification, testimony as to the out-of-court identification must be excluded. *Gilbert, supra,* 388 US at 273. In-court identification is only permissible if the prosecuting attorney shows by clear and convincing evidence that the in-court identification has a basis independent of the illegal lineup. *Wade*, supra, 388 US at 240, *Manson v Braithwaite,* 432 US 98 (1977), and *Anderson, supra* at 167.

These factors must be considered when determining whether an in-court identification has an independent basis:

- prior relationship with or knowledge of the defendant;
- the opportunity to observe the offense, including such factors as the length of time of the observation, lighting, noise, or other factors affecting sensory perception and proximity to the alleged criminal act;
- length of time between the offense and the disputed identification;
- accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description;
- any previous proper identification or failure to identify the offender;
- any identification prior to the lineup or showup of another person as defendant;
- the nature of the alleged offense and the physical and psychological state of the witness, including such factors as fatigue, nervous exhaustion, intoxication, age, and intelligence of the witness; and
- any idiosyncratic or special features of the defendant. *People v Kachar,* 400 Mich 78, 95–96 (1977).

7.5 Admissibility of Confessions Made by Juveniles

A. Violations of the "Immediacy Rule" and Their Effect on Voluntariness

Following a warrantless arrest for a felony, the peace officer must take an adult accused before a magistrate for arraignment "without unnecessary delay." MCL 764.13 and MCL 764.26. If a juvenile less than 17 years of age is taken into custody, the juvenile must "immediately" be taken before the Family Division of the Circuit Court of the county where the offense was allegedly committed. MCL 764.27. See also MCR 3.933 and 3.934.* However, if the prosecutor has authorized the filing of a complaint in District Court under the "automatic waiver" statute, MCL 600.606, the juvenile need not be taken to the Family Division following apprehension, but to the District Court for arraignment. *People v Brooks,* 184 Mich App 793, 797–98 (1990), *People v Spearman,* 195 Mich App 434, 443–45 (1992), overruled on other grounds 443 Mich 23, 43 (1993), MCR 6.907(A), and MCR 6.909(A).

*See Section 3.2 for a discussion of the "immediacy rule."

A conflict existed among Michigan courts for several years as to whether violation of the "immediacy rule" contained in MCL 764.27 dictated exclusion of a confession obtained following a violation of the rule, or whether the violation was merely one factor to consider in determining the voluntariness of the confession. In *People v Good*, 186 Mich App 180, 186–90 (1990), the Court of Appeals resolved the conflict in favor of a "totality of the circumstances" analysis, under which violation of the "immediacy rule" is one factor to consider in determining the voluntariness of a juvenile's confession. See also *People v Milton,* 191 Mich App 666 (1991) (following the approach adopted in *Good*).

In any case, a confession is inadmissible if a delay in bringing a juvenile before the Family Division is used as a tool to extract a confession. *People v Strunk,* 184 Mich App 310, 314–22 (1990).

Burden of proof. The defendant must come forward with evidence that the evidence in question was obtained as a result of a statutorily unlawful detention. If the defendant does so, the prosecuting attorney has the burden of proving the admissibility of the evidence. *People v Jordan,* 149 Mich App 568, 577 (1986).

B. Determining the Voluntariness of a Juvenile's Confession

Standard for voluntariness and factors to consider. Use of an involuntary confession may violate due-process requirements. *Gallegos v Colorado,* 370 US 49, 50 (1962). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Givans,* 227 Mich App 113, 121 (1997), citing *People v Peerenboom,* 224 Mich App 195, 198 (1997).

In *People v Good*, 186 Mich App 180, 189 (1990), the Court of Appeals set forth a "non-exhaustive" list of factors to be used to determine whether a statement was voluntarily made. Those factors are:

- whether *Miranda* requirements were met, and whether the juvenile clearly understood and waived his or her *Miranda* rights;
- the degree of police compliance with MCL 764.27 and the "juvenile court rules";*
- the presence of an adult parent, custodian, or guardian;
- the juvenile defendant's personal background;
- the juvenile's age, education, and intelligence level;
- the extent of the juvenile's prior experience with police;

*See Sections 3.1–3.3 for discussion of these requirements.

- the length of the detention before the statement was made;
- the repeated and prolonged nature of the questioning; and
- whether the juvenile was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

The effect of a failure to comply with *Miranda* requirements on voluntariness. If *Miranda* warnings are not required, it is clearly erroneous to find that a failure to give such warnings renders a confession involuntary. *In re SLL,* 246 Mich App 204, 209–10 (2001).*

*See Section 7.5(C), below, for discussion of *Miranda* requirements.

Presence of adult parent, guardian, or custodian. The Court of Appeals has suggested that a juvenile must request the presence of a parent or other adult before the absence of such a person should be considered in weighing the voluntariness of a juvenile's confession. See *Givans, supra* at 121. In *SLL, supra* at 206, the 13-year-old respondent's mother drove him to the police station in response to a police request to interview the boy. At the stationhouse, an officer advised respondent's mother of the allegations against her son and that she could contact an attorney. The officer then requested to speak with respondent alone though he was not under arrest. Respondent's mother agreed. The Court of Appeals concluded that the separation of respondent and his mother did not provide evidence that the resulting confession was involuntary because there was no suggestion of manipulation by police. *Id.* at 210.

See also *In re De Los Santos,* unpublished opinion per curiam of the Court of Appeals, decided December 28, 2001 (Docket No. 232592) (the trial court erred in suppressing the 12-year-old respondent's confession to second-degree criminal sexual conduct, where the respondent had recently been abandoned by his mother and was a temporary ward of the court, and where respondent's caseworker in the neglect case was not present during questioning).

Coercive police conduct required. Although a defendant's mental condition may be relevant to the voluntariness of a confession, coercive police conduct must be present to support a conclusion that a confession is involuntary within the meaning of the federal constitution. *Colorado v Connelly,* 479 US 157, 167 (1986) (mentally ill defendant's confession freely offered to police did not violate the 14th Amendment's Due Process Clause). See also *People v Fike,* 228 Mich App 178, 182 (1998) (citing *Connelly,* the Court of Appeals found no error where the police did not exploit the defendant's lack of intelligence). Where a defendant claims that police conduct at the time of arrest rendered a subsequent confession involuntary, there must be a sufficient causal link between the police conduct and confession. *People v Wells,* 238 Mich App 383, 386–90 (1999) (factors to consider when evaluating the connection between an alleged beating by police at time of arrest and a subsequent confession).

*But see Section 7.5(D), below, for discussion of promises concerning diversion during the questioning or investigation of a juvenile.

Promises of leniency. A promise of leniency is merely one factor to be considered in evaluating the voluntariness of a defendant's or juvenile's confession. *People v Conte,* 421 Mich 704, 751, 761–62 (1984) (in a 4-3 decision, the Michigan Supreme Court rejected a rule that rendered a confession inadmissible if it was induced by a promise of leniency). Promises to help the accused and statements that cooperation will "make things go easier for the accused" or be taken into account at sentencing are not improper promises of leniency. *People v Ewing (On Remand),* 102 Mich App 81, 85–86 (1980), and *People v Carigon,* 128 Mich App 802, 810–12 (1983).*

In *Givans, supra* at 121–22, after the 16-year-old suspect in an attempted robbery and shooting told the police officer questioning him that he wanted to "make a deal" with the prosecutor, the officer told the suspect that he would include the suspect's cooperation during the questioning in the report to the prosecutor. Although the police had not found the suspect's fingerprints at the scene of the crimes, one of the officers asked him "how his fingerprints could have been found" at the scene. The suspect admitted participating in the offenses. The Court of Appeals upheld the trial court's finding that the suspect's statements were voluntarily made. Although a promise of leniency is one factor to consider in determining the voluntariness of a statement, the officer's promise to report the suspect's cooperation during the questioning did not constitute a promise of leniency. Moreover, the officer's implication that the suspect's fingerprints had been found did not render the suspect's otherwise voluntary statements involuntary.

Similarly, courts have found that police misrepresentation of facts is one factor to be considered but does not alone render a confession involuntary. *Frazier v Cupp,* 394 US 731, 740 (1969), *Ledbetter v Edwards,* 35 F3d 1062, 1069 (CA 6, 1994), and *People v Hicks,* 185 Mich App 107, 113 (1990).

Evidentiary hearings. A criminal defendant has the right to an evidentiary hearing upon request when he or she challenges the admissibility of evidence on constitutional grounds and a factual dispute exists. *People v Wiejecha,* 14 Mich App 486, 488 (1968), citing *Jackson v Denno,* 378 US 368 (1964), *People v Reynolds,* 93 Mich App 516, 519 (1979), and *People v Johnson,* 202 Mich App 281, 285–87 (1993). Where "a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical and mental duress," or other alerting circumstances, clearly and substantially raise a question about the voluntariness of a confession, the court may be required to conduct a hearing without a request by the defendant. *People v Hooks,* 112 Mich App 477, 480, 482 (1982), and *People v Ray,* 431 Mich 260, 271 (1988).

The trial judge alone must make a determination at a separate evidentiary hearing of the voluntariness of a confession. *Jackson, supra* 378 US at 395, and *People v Walker (On Rehearing),* 374 Mich 331, 336–38 (1965). The

mere hearing of legal arguments is insufficient. *People v Wright,* 6 Mich App 495, 502 (1967). The defendant may testify for the limited purpose of making a record of his or her version of the facts and circumstances under which the confession was obtained without waiving the right to decline to take the stand at trial. *Walker, supra* at 338, and MRE 104(d).

The sole issue in a hearing to determine the voluntariness of a confession is whether the confession was coerced. "Whether [the confession] is true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so." *Lego v Twomey,* 404 US 477, 484, n 12 (1972).

If the court determines that the confession was voluntary, the issue of voluntariness is not submitted to the jury; jury consideration is limited to the weight and credibility of the defendant's statements. *Walker, supra* at 337–38. Involuntary confessions must not be used to establish guilt or to impeach the defendant's credibility if he or she testifies at trial. *People v Reed*, 393 Mich 342, 356 (1975).

Burden and standard of proof. The prosecutor has the burden of proving that a confession was voluntarily given and not the product of coercion. *People v White,* 401 Mich 482, 494 (1977). The voluntariness of a defendant's confession must be established by a preponderance of the evidence. *Lego, supra* 404 US at 489 (the prosecutor must prove by a preponderance of the evidence that a defendant's confession was voluntary although states are free to set a higher standard of proof), and *People v Sears,* 124 Mich App 735, 738 (1983) (the Court of Appeals declined to require the prosecutor to prove the voluntariness of a confession beyond a reasonable doubt).

C. Determining Admissibility Under *Miranda*

Requirements of *Miranda.* Prior to admission of a criminal defendant's statements in the prosecutor's case-in-chief, the prosecutor must make an affirmative showing that *Miranda* warnings were given prior to a custodial interrogation and that a waiver was properly obtained. *Miranda v Arizona,* 384 US 436, 444 (1966), and *People v Arroyo,* 138 Mich App 246, 249–50 (1984). In *Miranda, supra,* the United States Supreme Court held that the prosecutor must present evidence that the defendant voluntarily, knowingly, and intelligently waived his or her privilege against self-incrimination and rights to consult with and have counsel present during a custodial interrogation. If the defendant claims that he or she did not validly waive *Miranda* rights, the prosecutor has the burden of proving by a preponderance of the evidence that there was a voluntary, knowing, and intelligent waiver of those rights. *Colorado v Connelly,* 479 US 157, 168 (1986), *People v Cheatham,* 453 Mich 1, 27 (1996), and *People v Daoud,* 462 Mich 621, 634 (2000). The court must examine the totality of the circumstances surrounding the interrogation when evaluating the validity of

a purported waiver of *Miranda* rights. *Fare v Michael C,* 442 US 707, 724–25 (1979).

The *Miranda* rules have been applied to juveniles. See *Fare, supra* 442 US at 717, n 4, 725 (assuming without deciding that *Miranda* applies to cases involving juveniles, the Court held that a juvenile's request to speak with his probation officer did not constitute an invocation of the juvenile's rights to counsel and to remain silent), and *People v Anderson,* 209 Mich App 527, 530–35 (1995).

When *Miranda* warnings must be given—custody and interrogation requirements. *Miranda* warnings must be given only in situations involving "custodial interrogation." Custodial interrogation means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People* v *Hill*, 429 Mich 382, 387 (1987), quoting *Miranda, supra* 384 US at 444.

Custody. Under both federal and Michigan law, *Miranda* warnings must be given to a suspect prior to questioning only when the suspect is in custody or otherwise deprived of freedom of action in any significant way, not at the time a person becomes the focus of an investigation. *Oregon v Mathiason,* 429 US 492, 495 (1977), *Hill, supra* at 391–99, and *People v Peerenboom,* 224 Mich App 195, 197–98 (1997). Warnings need not be given unless the person is arrested or deprived of his or her freedom to a degree associated with formal arrest. *California v Beheler,* 463 US 1121, 1125 (1983), *Terry v Ohio*, 392 US 1 (1968), *People v Chinn*, 141 Mich App 92, 96 (1985) (warnings not required during routine traffic stop), and *People v Edwards,* 158 Mich App 561, 564 (1987) (warnings not required during routine traffic stop where officer asks if there are weapons in the car). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California,* 511 US 318, 323 (1994). See also *People v Zahn,* 234 Mich App 438, 449 (1999) (interrogating officer's unspoken intent to prevent the defendant from leaving the apartment where the interrogation took place was improperly considered by the trial court).

Interrogation. In addition to the requirement that a person be in custody, *Miranda* warnings must be provided only if a person is subjected to "interrogation." "Interrogation" means "express questioning [or] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *Anderson, supra* at 532, citing *Rhode Island v Innis,* 446 US 291, 301 (1980). See also *People v Fisher,* 166 Mich App 699, 708 (1988), rev'd on other grounds 442 Mich 560 (1993), and cases cited therein (placing incriminating evidence in the suspect's view is generally not "interrogation"). Even where a person is in custody, spontaneous and volunteered statements are not inadmissible due to a failure to provide *Miranda* warnings. *People v Raper,* 222 Mich App

475, 479–80 (1997) and *People v Black,* 203 Mich App 428, 430 (1994) (a juvenile's confession was admissible where the juvenile initiated a conversation with police after invoking her *Miranda* rights).

A person who is not a police officer or not "acting in concert with or at the request of police authority" is not required to give *Miranda* warnings. *Grand Rapids v Impens,* 414 Mich 667, 673 (1982), quoting *People v Omell,* 15 Mich App 154, 157 (1968). In *Impens*, the Michigan Supreme Court held that a deputy sheriff "moonlighting" as a private security guard at a Meijer store was not required to give *Miranda* warnings prior to questioning a shoplifting suspect. In *Anderson, supra* at 530–35, the Court of Appeals held that a juvenile corrections officer is not a law enforcement officer for *Miranda* purposes. In *People v Porterfield,* 166 Mich App 562, 567 (1988), the Court of Appeals held that a defendant's statement made to a Children's Protective Services caseworker in the course of an investigation was admissible in a criminal prosecution. The Court stated that "although the caseworker was a state employee, she was not charged with enforcement of criminal laws and she was not acting at the behest of the police; therefore, she need not have advised defendant of his *Miranda* rights." See also *In re Garrett,* unpublished opinion per curiam of the Court of Appeals, decided February 8, 2002 (Docket No. 234708) (a high school guidance counselor was not required to give the respondent *Miranda* warnings because he was not acting at the behest of police).

Requirements to establish a valid waiver of *Miranda* rights. To establish a valid waiver of *Miranda* rights, the prosecutor must prove that the suspect voluntarily, knowingly, and intelligently waived those rights. *Miranda, supra* 384 US at 444, 475. A waiver is valid if the "suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction . . . ." *Moran v Burbine,* 475 US 412, 422 (1986). Coercive police conduct must be present to support a conclusion that a waiver of *Miranda* rights is involuntary. *Connelly, supra* 479 US at 165 (1986), and *People v Howard,* 226 Mich App 528, 538 (1997). When determining whether a waiver was knowing and intelligent, the court must conduct a subjective inquiry into the suspect's level of understanding of his or her rights, irrespective of police behavior. *Cheatham, supra* at 26. However, "a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *Id.* at 28. See also *Daoud, supra* at 636–39, and *In re Abraham,* 234 Mich App 640, 646–55 (1999) (11-year-old defendant knowingly and intelligently waived his *Miranda* rights).

Waiver of *Miranda* rights need not be explicit but may be determined by examining the surrounding circumstances, "including the background, experience, and conduct of the accused." *North Carolina v Butler,* 441 US 369, 375 (1979). In *Butler, supra* 441 US at 373, the United States Supreme Court stated as follows:

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

In *Abraham, supra,* the defendant, who was 11 years old at the time, allegedly fatally shot one person and attempted to shoot another person. Police questioned defendant two days after the shootings. Defendant's mother was present during the questioning. After initially offering innocent explanations of his participation in the shootings, defendant told police that he had shot the victim who died. The prosecuting attorney designated defendant's case for criminal trial in the Family Division. The trial court suppressed the defendant's confession, finding that he hadn't knowingly and intelligently waived his *Miranda* rights.

On appeal, the prosecuting attorney argued that the trial court failed to apply the correct legal standard of mental competency for a knowing and intelligent waiver of defendant's *Miranda* rights, and that the trial court over-emphasized defendant's lack of understanding that he was being questioned in connection with a murder investigation. The Court of Appeals agreed, concluding that, considering the totality of circumstances surrounding the waiver, defendant understood the rights he was waiving "well enough." "While we do not suggest that defendant had an especially sophisticated understanding of what police told him, we emphasize again that such an understanding is not legally required," the Court of Appeals stated.

Defendant's lack of "expressive language skills" and "abstract verbal reasoning and more practical problem solving skills," when compared with others in his age group, did not rise to the level of a mental impairment that rendered him incapable of knowingly waiving his rights. Defendant's actions leading up to the shootings, and his admission during the suppression hearing that he initially misled police during questioning to appear cooperative, indicated that he had sufficient ability to make a knowing waiver of *Miranda* rights. In addition, the police officers' failure to inform defendant that he was suspected of murder did not alone support the conclusion that the waiver was not "knowing and intelligent." The Court

of Appeals emphasized that defendant's mother participated in defendant's waiver of his rights and was present during questioning.

When an evidentiary hearing must be conducted. A separate evidentiary hearing must be conducted by the court when the defendant challenges the admissibility of his or her statements on the basis of an alleged *Miranda* violation. *Arroyo, supra* at 249-250.

D. Limitations on Use of Statements Made by Juveniles During Informal Proceedings

Diversion. A diversion conference may not be held until after the questioning, if any, of the minor has been completed or after an investigation has been made concerning the alleged offense. Mention of, or promises concerning, diversion shall not be made by a law enforcement official or court intake worker in the presence of the minor or the minor's parent, guardian, or custodian during any questioning of the minor. Information divulged by the minor during the conference or after the diversion is agreed to, but before a petition is filed with or authorized by the court, cannot be used against the minor. MCL 722.825(2).

Consent calendar. MCR 3.932(C)(8) permits the court to transfer the case to the formal calendar if "it appears to the court at any time that the proceeding on the consent calendar is not in the best interest of either the juvenile or the public . . ." The court need not conduct a hearing before transferring the case to the formal calendar. *Id*. If the case is transferred to the formal calendar, however, the court must inform the juvenile of his or her right to an attorney, and that any statement made by the juvenile may be used against him or her. See *In re Chapel,* 134 Mich App 308, 312–13 (1984) (full panoply of rights under court rules vests when case is placed on formal calendar). Statements made by the juvenile during consent calendar proceedings may not be used at a trial on the formal calendar that is based on the same charge. MCR 3.932(C)(8).

7.6 Selected Search and Seizure Issues

Family Division judge's authority to issue a search warrant. MCR 3.922(A)(1)(h) contemplates the issuance of search warrants in juvenile delinquency cases. That rule allows discovery of "all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories." There is general authority for circuit court judges to issue search warrants. MCL 780.651(2)(a) and (3) specify that judges may issue search warrants. MCL 780.651 also authorizes "magistrates" to issue search warrants. MCL 761.1(f) defines "magistrate" as a district court or municipal court judge, and goes on to state the following:

> "This definition does not limit the power of a justice of the supreme court, *a circuit judge,* or a judge of a court of record having jurisdiction of criminal cases under this act, *or deprive him or her of the power to exercise the authority of a magistrate."* (Emphasis added.)

Circuit court referees have no authority to issue search warrants. See MCL 780.651, MCL 761.1(f), MCL 712A.10(1), and MCR 3.913.

Application of constitutional protections to minors. The Fourth Amendment to the United States Constitution and Const 1963, art 1, §11, protect "persons" from unreasonable searches and seizures. These constitutional provisions apply to minors. See *Tinker v Des Moines Independent Community School District,* 393 US 503, 511 (1969) (students, in school and out, are "persons" under the constitution), and *People v Flowers,* 23 Mich App 523, 527 (1970) (17-year-old's rights under the federal and state constitutions were violated by a warrantless search and seizure), disagreed with on other grounds in *People v Goforth,* 222 Mich App 306, 315 (1997). When evidence seized during a warrantless search is to be admitted in a criminal proceeding, the prosecutor must show that the search was reasonable by showing that he or she had probable cause to believe that contraband or evidence of crime was present. *Bd of Educ v Earls,* 122 S Ct 2559, 2564 (2002).

MCR 3.922(C) provides for pretrial motions to suppress evidence in juvenile delinquency cases. Evidence secured by a search and seizure conducted in violation of US Const, Am IV, is inadmissible in a state court. *Mapp v Ohio,* 367 US 643 (1961). The "exclusionary rule" prohibits use of evidence in criminal proceedings that was directly or indirectly obtained through a violation of an accused's constitutional rights. *Wong Sun v United States,* 371 US 471, 484–85 (1963), and *People v LoCicero (After Remand),* 453 Mich 496, 508 (1996). However, it is unclear whether the exclusionary rule *must* be applied in juvenile delinquency proceedings. See *New Jersey v TLO,* 469 US 325, 328, 331–32 (1985) (the United States Supreme Court originally granted *certiorari* to consider the appropriate remedy in a delinquency proceeding for a violation of the Fourth Amendment by a school official but later limited review to the required level of suspicion to support such a search), *In re William G,* 709 P2d 1287, 1298 (Calif 1985) (exclusionary rule is applicable in delinquency proceedings), and *Gilbert v Leach,* 62 Mich App 722, 725–26 (1975), aff'd 397 Mich 384 (illegally obtained evidence is inadmissible in civil proceedings). In addition, where no government official is involved in a search and seizure, the objects seized may be admitted at a criminal trial. *Burdeau v McDowell,* 256 US 465, 475 (1921).

Burden of proof. Where the defendant seeks to suppress evidence seized pursuant to a warrantless search and seizure, the burden of proof is on the prosecution to show that the search and seizure were reasonable and fell under a recognized exception to the warrant requirement. *People v White,*

392 Mich 404, 410 (1974). Where the prosecution relies on consent to justify a warrantless search and seizure, it has the burden to prove that the consent was unequivocal and specific, and freely and intelligently given. *People v Kaigler,* 368 Mich 281, 294 (1962). See also *People v Dinsmore,* 103 Mich App 660, 672 (1981) (prosecutor has the burden of establishing the voluntariness of the consent by "direct and positive evidence"), and *United States v Matlock,* 415 US 164, 177 (1974) (prosecutor must show the voluntariness of consent by a preponderance of the evidence). Because a consent to search involves the relinquishment of a constitutional right, the prosecutor cannot discharge this burden by showing a mere acquiescence to a claim of lawful authority. *Bumper v North Carolina,* 391 US 543, 548–49 (1968). Where the defendant is under arrest at the time of the alleged consent, the prosecutor's burden is "particularly heavy." *Kaigler, supra* at 294.

The defendant has the burden of establishing his or her standing to challenge the search or seizure. *People v Zahn,* 234 Mich App 438, 446 (1999), and *People v Lombardo,* 216 Mich App 500, 505 (1996).

Free and voluntary consent to warrantless search. One exception to the general probable cause and warrant requirements is a search conducted pursuant to a valid consent. *Schneckloth v Bustamonte,* 412 US 218, 219 (1973). To determine whether consent was freely and voluntarily given rather than a product of police coercion, a court must examine the totality of the circumstances surrounding the consent, including the characteristics of the person who consented. *Id.,* 412 US at 226–27, and *People v Reed,* 393 Mich 342, 362–63 (1975). Police officers need not always inform persons of their right to refuse consent. *Ohio v Robinette,* 519 US 33, 39–40 (1996). In addition, age, maturity, and educational level may be considered in determining the voluntariness of the consent to search. *United States v Mayes,* 552 F2d 729, 732–33 (CA 6, 1977), and *In re JM,* 619 A2d 497, 502 (DC App 1992) (14-year-old suspect's age and maturity "critical" to the validity of his consent to frisk of his person).

Parental consent to a warrantless search of child's bedroom. "There is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises." *People v Goforth,* 222 Mich App 306, 315 (1997), citing *People v Grady,* 193 Mich App 721, 724 (1992). If a parent has common authority (joint access and control) over a child's bedroom, a parent may validly consent to a search of the bedroom. *Goforth, supra* at 316.

Warrantless searches of students by school officials. In *TLO, supra* 469 US at 333, the United States Supreme Court, in a plurality opinion, first held that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to public school officials. A plurality of the Court also held that evidence seized as a result of a warrantless search by public school officials may be admitted in a delinquency proceeding if the official had a

"reasonable suspicion" that the search would uncover evidence of a violation of school disciplinary rules or a violation of law. The scope of the search must be reasonably related to the objectives of the search and not overly intrusive given the age and sex of the student and the alleged violation. *Id.* at 341–42. See also *People v Mayes (After Remand),* 202 Mich App 181, 201 (1993) (Corrigan, PJ, concurring) (under *TLO,* an assistant principal could have legally searched a car parked in a school parking lot where the assistant principal had reliable information that a gun was in the car).

Prior to *TLO,* the Michigan Court of Appeals addressed the issue of searches by school officials in *People v Ward,* 62 Mich App 46 (1975). The Court of Appeals adopted a "reasonable suspicion" standard for such searches. The Court stated the following rationale for its holding:

> "School officials stand in a unique position with respect to their students. They possess many of the powers and responsibilities of parents to enable them to control conduct in their schools. . . . At times, the powers and responsibilities regarding discipline and the maintenance of an educational atmosphere may conflict with fundamental constitutional safeguards. A student cannot be subjected to unreasonable searches and seizures. On the other hand, the public interest in maintaining an effective system of education and the more immediate interest of a school official in protecting the well-being of the students entrusted to his supervision against the omnipresent dangers of drug abuse must be considered. In striking a balance, we adopt a 'reasonable suspicion' standard." *Id.* at 50–51 (citations omitted).

A "reasonable suspicion" is based upon the totality of the surrounding circumstances and requires "articulable reasons" and "a particularized and objective basis for suspecting the particular person." *United States v Cortez,* 449 US 411, 417–18 (1981).

Warrantless searches of lockers and lockers' contents by school officials and law enforcement officers. The United States Supreme Court in *TLO* did not address the issue of whether a public school student has a reasonable expectation of privacy in school lockers. *TLO, supra* 469 US at 337, n 5. In Michigan, this issue is addressed in MCL 380.1306. MCL 380.1306(1) states that "[a] pupil who uses a locker that is the property of a school district, local act school district, intermediate school district, or public school academy is presumed to have no expectation of privacy in that locker or that locker's contents."

MCL 380.1306(2)–(5) require school boards and boards of directors of public school academies to adopt policies on searches of pupil lockers and lockers' contents. MCL 380.1306(2) requires that pupils and their parents

receive copies of the policies. Pursuant to a search policy, a public school principal or designee may search a pupil's locker or a locker's contents at any time. MCL 380.1306(3). "Any evidence obtained as a result of a search of a pupil's locker or locker's contents shall not be inadmissible in any court or administrative proceedings because the search violated this section, violated the policy under subsection (2), or because no policy was adopted." MCL 380.1306. Because these provisions allow for random searches of school lockers and admissibility of evidence seized, they may contradict the Court of Appeals' holding in *Ward, supra,* that a "reasonable suspicion" standard applies to searches of students by school officials.

The statute also provides for law enforcement assistance in conducting a search. MCL 380.1306(4) states:

> "A law enforcement agency having jurisdiction over the school may assist school personnel in conducting a search of a pupil's locker and the locker's contents if that assistance is at the request of the school principal or his or her designee and the search is conducted in accordance with the policy under subsection (2).

In *TLO, supra* 469 US at 341, n 7, the United States Supreme Court did not address the proper standard to apply to school searches conducted in conjunction with or at the behest of law enforcement officials. See also *Mayes, supra* (Corrigan, PJ, concurring) (the quantum of suspicion for a search on school property should not shift only because a law enforcement officer conducts the search at the behest of a school official).

Warrantless searches of juvenile probationers. The Family Division may enter an order of disposition placing the juvenile "on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile." MCL 712A.18(1)(b). The court must order terms and conditions of probation "as the court deems necessary for the physical, mental, or moral well-being and behavior of the juvenile." *Id.* In cases involving adult criminal defendants, it is unclear whether consent to warrantless searches may properly be made a condition of probation. Compare *People v Hellenthal,* 186 Mich App 484, 486 (1990) (such a condition is proper if reasonably tailored to the defendant's rehabilitation) and *People v Peterson,* 62 Mich App 258 (1975) (such a condition is improper).

Strip and body cavity searches. MCL 764.25a provides rules governing strip searches of juveniles and adult prisoners charged with misdemeanor offenses and civil infractions. MCL 764.25a(1)–(3) contain the general requirements for such searches:

> "(1) As used in this section, "strip search" means a search which requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia.

> "(2) A person arrested or detained for a misdemeanor offense, or an offense which is punishable only by a civil fine shall not be strip searched unless both of the following occur:
>
> > (a) The person arrested is being lodged into a detention facility by order of a court or there is reasonable cause to believe that the person is concealing a weapon, a controlled substance, or evidence of a crime.
> >
> > (b) The strip search is conducted by a person who has obtained prior written authorization from the chief law enforcement officer of the law enforcement agency conducting the strip search, or from that officer's designee; or if the strip search is conducted upon a minor in a juvenile detention facility which is not operated by a law enforcement agency, the strip search is conducted by a person who has obtained prior written authorization from the chief administrative officer of that facility, or from that officer's designee.
>
> "(3) A strip search conducted under this section shall be performed by a person of the same sex as the person being searched and shall be performed in a place that prevents the search from being observed by a person not conducting or necessary to assist with the search. A law enforcement officer who assists in the strip search shall be of the same sex as the person being searched."

By its terms, MCL 764.25a does not apply to persons arrested or detained for felony offenses. Furthermore, MCL 764.25a(7) provides that the statute does not apply if a person is being lodged or detained pursuant to a court order:

> "(7) This section shall not apply to the strip search of a person lodged in a detention facility by an order of a court or in a state correctional facility housing prisoners under the jurisdiction of the department of corrections, including a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g."

For purposes of MCL 764.25a(7), the court order authorizing detention must be entered upon the record of the court. In criminal cases, an arrest warrant is not "an order of a court authorizing continued custody or detention of a person in a detention facility." OAG, 1985, No 6,298, p 89 (June 6, 1985). See also MCL 712A.2c and MCR 3.933(B), which allow the court to issue

an order to apprehend a juvenile. "Detention in a facility subsequent to an arrest, but prior to an appearance before a magistrate, is not pursuant to an order of a court requiring the lodging of the person in a detention facility." *Id.* If a person is lodged in a detention facility pursuant to court order following a preliminary hearing or arraignment, a strip search may be conducted without regard to the requirements of MCL 764.25a.

A body cavity search may only be conducted pursuant to a valid search warrant, unless the person to be searched is serving a sentence for a criminal offense in a detention or correctional facility under the jurisdiction of the Department of Corrections. See MCL 764.25b for the requirements for body cavity searches.

Any strip or body cavity search must comply with the Fourth Amendment's "reasonableness" requirement. See *Bell v Wolfish,* 441 US 520, 559 (1979) (setting forth the balancing test to determine reasonableness, and upholding the practice of routine strip searches following contact visitation).

7.7 Order for Examination of Juvenile

MCL 712A.12 states that "[a]fter a petition shall have been filed and after such further investigation as the court may direct, in the course of which the court may order the child to be examined by a physician, dentist, psychologist or psychiatrist," the court may dismiss the petition or issue a summons to the persons who have custody or control of the child. See also MCR 3.923(B), which allows the court to order an evaluation or examination of a minor *or parent.*

MCL 722.124a(1) allows a court or an agency to consent to emergency medical or surgical treatment in the absence of parental consent if the child is placed outside the home. Psychological evaluations have been defined by the Court of Appeals as routine care for emotionally disturbed children in temporary custody. *In re Trowbridge,* 155 Mich App 785, 787–88 (1986).

7.8 Evaluating a Juvenile's Competence

In *In re Carey,* 241 Mich App 222, 223–25 (2000), the prosecuting attorney filed a motion requesting that the juvenile be evaluated for both competency and criminal responsibility. The Institute for Forensic Psychiatry apparently refused to conduct the evaluations, and the juvenile was evaluated by two psychologists in private practice. Although the psychologists testified regarding the juvenile's level of intellectual functioning, they were not allowed to testify regarding his competency to "stand trial." The trial court ruled that a juvenile's competency was irrelevant to the adjudicative phase of a delinquency proceeding. The Court of Appeals reversed, concluding:

> "(1) juveniles have a due process right not to be subjected to the adjudicative phase of juvenile proceedings while incompetent, and (2) although the Mental Health Code provisions for competency determinations by their terms apply only to defendants in criminal proceedings, they can serve as a guide for juvenile competency determinations."

The Court of Appeals noted that a juvenile's right to counsel "means little if the juvenile is unaware of the proceedings or unable to communicate with counsel because of a psychological or developmental disability." *Id.* at 230. With regard to the procedures to be used, the Court first concluded that the court rule governing competency determinations of adults, MCR 6.125, does not apply to juvenile proceedings. *Id.* at 231. The provisions of the Mental Health Code governing competency determinations, MCL 330.2020 et seq., should be followed *where possible.* Although by statute the Institute for Forensic Psychiatry may not perform evaluations of juvenile respondents, other provisions of the Mental Health Code should be applied to the extent possible. *Id.* at 233, n 3. "[I]n the absence of other applicable rules or statutes, . . . provisions [of the Mental Health Code] should be used to assure that the due process rights of a juvenile are protected." *Id.* at 234. Furthermore, competency evaluations should be made using juvenile rather than adult norms. Because a juvenile may not understand court proceedings as well as an adult due to age and lack of experience, a juvenile need not be found incompetent merely because he or she does not understand the proceedings as well as an adult would. *Id.*

*For discussion of the court's responsibility for the costs of competency examinations and other predisposition procedures, see Section 11.1.

In light of the Court of Appeals' opinion in *Carey,* the following summary of the provisions of the Mental Health Code applicable to competency determinations is provided for guidance.* The summary also includes case law interpreting the rules applicable to adult competency determinations.

Moving party and burden of proof. The issue of a criminal defendant's competence to stand trial is usually raised by the defendant, but it may be raised by the prosecuting attorney or by the court. MCL 330.2024. A criminal defendant is presumed competent to stand trial, MCL 330.2020(1); he or she must prove incompetence by a preponderance of the evidence. See *Medina v California,* 505 US 437, 449 (1992) (it does not violate the federal constitution for a state to presume that the defendant is competent and to require him or her to prove incompetence by a preponderance of the evidence).

A criminal defendant must be competent to stand trial or plead guilty. MCL 330.2022(1) and *People v Kline,* 113 Mich App 733, 738 (1982). The standard of competence to stand trial is stated in MCL 330.2020(1):

> "[A defendant] shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the

> proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during trial."

The determination of a defendant's competence is within a trial court's discretion. *People v Newton (After Remand),* 179 Mich App 484, 488 (1989).

Raising the issue of competence. A criminal defendant's competence to stand trial or participate in other criminal proceedings may be raised by a party or the court at any time during the proceedings. MCL 330.2024. When facts are brought to the trial court's attention that raise a *bona fide* doubt about a defendant's competency to stand trial, the trial court has a duty to raise the issue *sua sponte* even though defense counsel does not request a competency examination. *People v Harris* 185 Mich App 100, 102–03 (1990). Otherwise, the defendant must make a sufficient showing in order to be entitled to an examination. *People v Stripling,* 70 Mich App 271, 276 (1976).

In *Drope v Missouri,* 420 US 162, 177 n 13, 180 (1975), the United States Supreme Court set forth relevant considerations to determine when the issue of a criminal defendant's competency should be explored further. Those considerations are 1) an expressed doubt by counsel concerning a client's competency although a court is not required to accept such representations without question, 2) evidence of a defendant's irrational behavior and demeanor at trial, and 3) prior medical opinion regarding the defendant's competency to stand trial. See also *Owens v Sowder,* 661 F2d 584, 586–87 (CA 6, 1981) (defense counsel did not document prior psychiatric problems and defendant's behavior did not suggest need for examination). In *People v Whyte,* 165 Mich App 409, 413 (1988), the Court of Appeals held that the requisite showing that the defendant may have been incompetent to plead guilty was made when the presentence investigation reports containing the defendant's extensive history of mental illness were disclosed to the trial court.

Ordering an examination. The court must order a criminal defendant to undergo a forensic examination upon a showing that the defendant may be incompetent to stand trial. MCL 330.2026(1). For adult criminal defendants, the examination must be conducted by personnel of the Center for Forensic Psychiatry or of another facility officially certified by the Department of Mental Health to perform examinations relating to the issue of incompetence to stand trial. MCL 330.2026(1). As noted in *Carey, supra* at 233, n 3, the Center for Forensic Psychiatry may not perform competency examinations of juveniles. In the absence of another certified facility, a court may utilize a local psychiatrist or psychologist who is qualified to conduct such examinations.

A forensic examination must be performed and a written report submitted to the court and parties within 60 days after the examination is ordered. MCL 330.2028(1). Pursuant to MCL 330.2028(2)(a)–(d), the report must contain the following elements:

> "(a) The clinical findings of the center or other facility.
>
> "(b) The facts, in reasonable detail, upon which the findings are based, and upon request of the court, defense, or prosecution additional facts germane to the findings.
>
> "(c) The opinion of the center or other facility on the issue of the incompetence of the defendant to stand trial.
>
> "(d) If the opinion is that the defendant is incompetent to stand trial, the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment, within [15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less]."

Conducting a hearing. If a forensic examination is conducted, a competency hearing must be held within five days of the court's receipt of the report of the forensic examination or on conclusion of the proceedings, whichever is sooner. The court may grant an adjournment upon a showing of good cause. MCL 330.2030(1). Although MCL 330.2030(1) explicitly requires the court to conduct a hearing upon receiving the report of the forensic examination, case law suggests that a hearing need be held only if there is evidence of incompetence and a request by the defendant. "If there be *evidence* of incompetence, the issue must be decided [at a hearing]." *People v Blocker,* 393 Mich 501, 510 (1975) (emphasis in original). In *Blocker,* an independent psychiatric examination of the defendant was conducted and a report returned, but the defendant did not request a hearing following the examination or present evidence of incompetence at trial. The Supreme Court held that the trial court did not err in failing to decide the issue at a formal hearing. *Id.* However, there is also authority for the proposition that the defendant is entitled to a hearing on statutory and constitutional grounds. See *Id.* at 519 (Swainson, J, dissenting), and *People v Lucas,* 393 Mich 522, 527 (1975). The trial court may base its decision solely on the report only if the parties choose not to present other evidence. *People v Livingston,* 57 Mich App 726, 735–36 (1975) ("[t]he parties must be expressly made aware that a competency hearing . . . is being held, that they have the right to present evidence, and that failure to exercise that right will result in a determination of competency . . .").

A criminal defendant must appear at the hearing. MCL 330.2030(1). See also *People v Thompson,* 52 Mich App 262, 264–66 (1974) (because the defendant has a constitutional right to be present at the hearing, defense

counsel may not waive that right by failing to contest the issue of the defendant's competence).

The Michigan Rules of Evidence apply during the hearing. MRE 1101(a). The court must determine the issue of competency based on evidence admitted at the hearing. Absent objection, the written forensic examination report is admissible at the hearing but is not admissible for any other purpose. The defense, prosecution, and court may present additional evidence at the hearing. MCL 330.2030(2) and (3).

If the court finds that the defendant is incompetent to stand trial and that there is not a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less, the court may order the prosecuting attorney to petition for the involuntary civil commitment of the defendant. MCL 330.2031.* If the court finds that there is a substantial probability that the defendant will attain competence to stand trial within these time limits, the court must order the defendant to undergo an appropriate course of treatment. MCL 330.2032(1).

*For the required procedures for civil admission of minors, see MCL 330.1498a et seq.

Redetermining competence. The court must conduct a hearing to redetermine the competence of a defendant at least every 90 days. MCL 330.2040. The person supervising the defendant's treatment must submit a report to the court, parties, and Center for Forensic Psychiatry every 90 days, whenever he or she believes that the defendant is competent to stand trial, or whenever he or she believes that there is a substantial probability that the defendant, with treatment, will attain competence to stand trial within 15 months or one-third of the maximum sentence the defendant could receive if convicted, whichever is less. MCL 330.2038(1)(a)–(c).

Dismissing charges against a criminal defendant. Pursuant to MCL 330.2044(1)(a)–(b), the court must dismiss the charges against a criminal defendant in the following cases:

> "(a) When the prosecutor notifies the court of his intention not to prosecute the case; or
>
> "(b) Fifteen months after the date on which the defendant was originally determined incompetent to stand trial."

The 15-month period starts when the defendant is adjudicated incompetent, not when the defendant is committed for a diagnostic examination. *People v Davis,* 123 Mich App 553, 557 (1983). When an accused has been adjudicated incompetent for a total period of more than 15 months, regardless of whether the period was continuous, the charges against the defendant must be dismissed. *People* v *Miller*, 440 Mich 631, 633 (1992). However, if the defendant was charged with a life offense, the prosecuting attorney may petition at any time to refile the charge. For other offenses, the

prosecuting attorney may petition to refile the charge within the period of time equal to one-third of the maximum possible sentence for the offense. MCL 330.2044(3). The court must grant the prosecuting attorney permission to refile charges if after a hearing it determines that the defendant is competent to stand trial. MCL 330.2044(4).

If the defendant is to be discharged or released, the person supervising the defendant's treatment may file a petition requesting the involuntary civil commitment of the defendant. MCL 330.2034(3).*

*For the required procedures for civil admission of minors, see MCL 330.1498a et seq.

Maintaining a criminal defendant's competence through the use of psychotropic drugs. MCL 330.2020(2) states:

> "A defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial. However, when the defendant is receiving such medication, the court may, prior to making its determination on the issue of incompetence to stand trial, require the filing of a statement by a treating physician that such medication will not adversely affect the defendant's understanding of the proceedings or his ability to assist in his defense."

In order to maintain the competence of the defendant, the trial court may order that defendant continue to take such medication during trial. MCL 330.2030(4). In *People* v *Hardesty*, 139 Mich App 124, 137 (1984), the Court of Appeals first held that MCL 330.2020(2) is constitutional. In addition, the Court held that the issue of whether MCL 330.2030(4) improperly interferes with a defendant's right to present an insanity defense must be decided on a case-by-case basis. *Id.* at 145. A trial court must "balance the state's interest in safety and trial continuity . . . with the defendant's interest in presenting probative evidence of insanity through his manner and demeanor on the witness stand . . . ." *Id.*

7.9 Raising Alibi or Insanity Defenses

MCR 3.922(B)(1)–(3) provide procedural requirements for raising an alibi, insanity, or diminished capacity defense in juvenile delinquency proceedings. These rules provide that:

> "(1) Within 21 days after the juvenile has been given notice of the date of trial, but no later than 7 days before the trial date, the juvenile or the juvenile's attorney must file a written notice with the court and prosecuting attorney of the intent to rely on a defense of alibi or

> insanity. The notice shall include a list of the names and addresses of defense witnesses.
>
> "(2) Within 7 days after receipt of notice, but no later than 2 days before the trial date, the prosecutor shall provide written notice to the court and defense of an intent to offer rebuttal to the above-listed defenses. The notice shall include names and addresses of rebuttal witnesses.
>
> "(3) Failure to comply with subrules (1) and (2) may result in the sanctions set forth in MCL 768.21."

Michigan's so-called diminished capacity defense, which allows evidence of mental incapacity short of insanity to be used to avoid or reduce criminal responsibility by negating specific intent, has been abrogated by the Supreme Court in *People v Carpenter*, 464 Mich 223 (2001). Although the defense was once part of Michigan's comprehensive statutory framework governing the insanity defense, the Supreme Court in *Carpenter* held that the Legislature demonstrated its policy choice by eliminating diminished capacity as a defense and by creating an "all or nothing insanity defense," in which a "mentally ill" or "mentally retarded" criminal defendant can *only* be legally insane or guilty but mentally ill:

> "We conclude that, through this [comprehensive statutory] framework, the Legislature has created an all or nothing insanity defense. Central to our holding is the fact that the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane. As noted above, such a person may be found 'guilty but mentally ill' and must be sentenced in the same manner as any other defendant committing the same offense and subject to psychiatric evaluation and treatment. MCL 768.36(3)." *Id*. at 237.

MCL 768.36(1) allows the trier of fact to return a verdict of "guilty but mentally ill" if the trier of fact finds 1) that a criminal defendant is guilty of an offense, 2) the defendant has proven by a preponderance of the evidence that he or she was mentally ill when the offense was committed, but 3) the defendant has not established by a preponderance of the evidence that he or she was legally insane when the offense was committed. In contrast to a "not guilty by reason of insanity" verdict, a "guilty but mentally ill" verdict does not absolve a defendant of criminal responsibility; instead, it affords the defendant psychiatric treatment as part of his or her sentence. MCL 768.36(3)–(4). It is unclear whether Michigan's statutory "guilty but mentally ill" verdict applies in juvenile delinquency cases. See *In re Ricks,* 167 Mich App 285, 293–94 (1988) (noting that in a delinquency case, the verdict is either that the juvenile does or does not come within the court's

jurisdiction), MCR 3.942(D) (verdict in delinquency proceeding must be either guilty or not guilty of alleged or lesser-included offense), and MCL 712A.18(1) (after the trier of fact determines that a juvenile comes within the court's jurisdiction, the court may enter an appropriate order of disposition based upon the best interests of the juvenile and public).

A. Alibi

According to *People v Erb*, 48 Mich App 622, 630 (1973), a jury must be instructed that the alibi defense provides two avenues of relief:

> "First, if the alibi is established, a perfect defense has been shown and the defendant should accordingly be acquitted. Alternatively and perhaps more importantly, the instruction must clearly indicate that if any reasonable doubt exists as to the presence of the defendant at the scene of the crime [if such presence is necessary to commit the crime] then, also, the defendant should be acquitted." See also *People v Burden*, 395 Mich. 462, 467 (1975), which added the bracketed language above into its jury instruction.

While the prosecutor has to prove beyond a reasonable doubt that the defendant was at the crime scene at the time of the crime, the defendant has the "burden of producing at least some evidence in support of his claim of alibi, possibly sufficient evidence to raise a reasonable doubt." *People v Fiorini*, 85 Mich App 226, 229-230 (1985). See also *People v McCoy*, 392 Mich 231, 235 (1974) (a defendant need not prove an alibi by preponderance of the evidence, but must only raise a reasonable doubt concerning the defendant's presence at the crime scene). A general denial of charges does not constitute an alibi defense, although a defendant's uncorroborated testimony that he or she was elsewhere than at the crime scene entitles the defendant to a jury instruction. *People v McGinnis*, 402 Mich 343, 346-347 (1978).

B. Insanity or Mental Illness Negating an Element of the Alleged Offense

Insanity defense. MCL 768.21a(1) governs the insanity defense:

> "It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of *mental illness* as defined in [MCL 330.1400a] or as a result of being *mentally retarded* as defined in [MCL 330.1500], that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of

> his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity." [Emphasis added.]

Note: MCL 768.21a(1) references MCL 330.1400a for the definition of "mental illness." However, MCL 330.1400a was repealed by 1995 PA 290. For purposes of the insanity statute, the definition in MCL 330.1400(g) should be used. *People v Mette*, 243 Mich App 318, 325 (2000). MCL 768.21a(1) also references MCL 330.1500 for the definition of "mentally retarded." However, MCL 330.1500 no longer contains a definition of "mentally retarded." Substantially similar definitions of "mentally retarded" appear in the Mental Health Code at MCL 330.2001a(6), and in the Penal Code at MCL 750.520a(i).

"Mental illness," as defined in MCL 330.1400(g), means:

> "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

"Mentally retarded," as defined in MCL 330.2001a(6), means:*

> "significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior."

*A substantially similar definition also appears in MCL 750.520a(i) of the Penal Code.

The defendant has to prove the affirmative defense of insanity by a preponderance of evidence. MCL 768.21a(3).

Under the insanity statute, "[a]n individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." MCL 768.21a(2).

The exception above does not apply if the voluntary and continued use of a mind-altering substance results in a settled condition of insanity before, during, or after the alleged offense. *People v Caulley*, 197 Mich App 177, 187 n 3 (1992). See also *People v Conrad*, 148 Mich App 433, 438 (1986) lv den 424 Mich 908 (1986) (the insanity statute "does not automatically preclude for all time the assertion of an insanity defense if a person is *rendered insane* by the voluntary ingestion of a drug" [emphasis in original]). In *Conrad*, the defendant was found guilty but mentally ill of second-degree murder for killing his younger brother. At trial, he interposed

an insanity defense based upon his voluntary use of phencyclidine (PCP) four or five times in the two weeks preceding the murder. The trial court rejected defendant's insanity defense, claiming that defendant's use of PCP was voluntary and thus prohibited him from asserting an insanity defense under MCL 768.21a(2). On appeal, the Court of Appeals held that defendant was denied a fair trial when the trial court rejected his insanity defense, stating "[I]f a defendant is actually and demonstrably rendered insane by the ingestion of mind-altering substances, an insanity defense is not absolutely precluded." *Conrad*, *supra* at 441.

Ordering the examination. If a juvenile is raising a defense of insanity or mental illness negating an element of the alleged offense, upon receipt of the required notice, the trial court must order the juvenile to undergo an examination for a period not to exceed 60 days by the Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a(2). See also *In re Ricks,* 167 Mich App 285, 290–91 (1988) (juvenile court did not err by ordering juvenile's examination to be conducted at the Wayne County Clinic for Child Study rather than the Center for Forensic Psychiatry). Both parties also may obtain independent psychiatric examinations. MCL 768.20a(3). See, however, *People v Smith*, 103 Mich App 209, 210-211 (1981) (the trial court properly denied defendant's request for an independent examination made on the day of trial.) An indigent defendant is entitled to one independent examination at public expense. *Id*. and *Ake v Oklahoma*, 470 US 68, 78-79, 83 (1985).

After the psychiatric examination is conducted, the examiner must prepare a written report and submit it to the prosecuting attorney and defense counsel. MCL 768.20a(6). It must contain the following information:

> "(a) The clinical findings of the center [for forensic psychiatry], the qualified personnel, or any independent examiner.
>
> "(b) The facts, in reasonable detail, upon which the findings were based.
>
> "(c) The opinion of the center or qualified personnel, and the independent examiner on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed." MCL 768.20a(6)(a)-(c).

Within ten days of receipt of the report from the forensic center or the prosecutor's independent examiner, whichever occurs later, but no less than five days before trial, or at such other time as the court directs, the prosecutor must file and serve notice of rebuttal, including witness names. MCL 768.20a(7).

A juvenile's statements made during an examination are privileged. MCL 768.20a(5) provides:

> "Statements made by the defendant to personnel of the center for forensic psychiatry, to other qualified personnel, or to any independent examiner during an examination shall not be admissible or have probative value in court at the trial of the case on any issues other than his or her mental illness or insanity at the time of the alleged offense."

C. Exclusion of Evidence for Failure to Meet Notice Requirements

MCL 768.21(1)–(2) allow the court to exclude evidence offered by the defendant or prosecuting attorney for the purpose of establishing or rebutting an alibi or insanity defense. If the required notice is not filed and served at all, the court must exclude the proffered evidence. In addition, if the notice given by the defendant or the prosecuting attorney does not state, as particularly as is known to the party, the name of a witness to be called to establish or rebut the defense, the court must exclude the testimony of the witness.

Alibi. Despite the language in MCL 768.21(1)–(2) that suggests that exclusion is mandatory if a proper notice is not filed, the trial court retains discretion to fix the timeliness of a notice. *People v Travis,* 443 Mich 668, 679 (1993). In exercising its discretion, a court should consider:

- the amount of prejudice resulting from the failure to disclose;
- the reason for nondisclosure;
- the extent to which the harm caused by nondisclosure was mitigated by subsequent events;
- the weight of the properly admitted evidence supporting defendant's guilt; and
- other relevant factors arising out of the circumstances of the case. *Id.* at 681–83, citing *United States v Myers,* 550 F2d 1036, 1043 (CA 5, 1977).

Insanity. Strict compliance with the statutory notice requirements regarding an insanity defense may not be necessary, where the parties have actual notice of witnesses who may be called and no surprise will result from the noncompliance. *People v Blue,* 428 Mich 684, 690 (1987), *People v Stinson,* 113 Mich App 719, 723–26 (1982) (the trial court properly ordered a one-week adjournment of trial to allow the prosecutor to file a notice of rebuttal, where defense counsel was aware of the prosecutor's intent to call an expert witness), and *People v Jurkiewicz,* 112 Mich App 415, 417 (1982)

(prosecutor's failure to file notice of rebuttal or request permission to file a late notice of rebuttal required exclusion of witness's testimony).

7.10 Demand for Jury Trial or Trial Before a Judge

Demand or waiver of trial by jury. MCR 3.911(A) states that "[t]he right to a jury in a juvenile proceeding exists only at the trial." MCR 3.911(B) provides that a party may demand a jury trial by filing a written demand with the court. The demand must be filed within 14 days after the court gives notice of the right to a jury trial or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be filed no later than 21 days before trial, but the court may excuse a late filing in the interest of justice. *Id.* MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial.

Neither the Juvenile Code nor the applicable court rules sets forth the procedure to waive the right to jury trial or withdraw a demand for jury trial. In *In re Whittaker,* 239 Mich App 26, 29 (1999), the Court of Appeals held that MCL 763.3, which governs waiver of the right to jury trial in criminal cases, does not apply to delinquency cases. The Court also noted that because juveniles do not have a constitutional right to jury trial in delinquency proceedings, the "waiver process does not implicate constitutional concerns." *Id.* at 28, citing *McKeiver v Pennsylvania,* 403 US 528, 533 (1971). The Court in *Whittaker* concluded that the applicable due-process standard of "fundamental fairness" was met where respondent's attorney stated in open court that respondent's attorney had spoken to the respondent's mother, and that they had decided to waive the right to jury trial. Neither the prosecutor nor the court objected. *Id.* at 29–30.

> **Note:** In *Whittaker,* the Court of Appeals did not address the applicability of MCR 1.104 to the case. MCR 3.901(A)(1) states in part that "[t]he rules in . . . subchapter 1.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 1.104 states that "[r]ules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." As noted above, no court rule applicable to juvenile delinquency proceedings governs waiver of the right to jury trial or withdrawal of a demand for jury trial. Thus, MCL 763.3 arguably applies to delinquency proceedings. That statute states:
>
> > "(1) In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing

> signed by the defendant and filed in the case and made a part of the record. The waiver and election shall be entitled in the court and case, and in substance as follows: 'I, _____, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.'
>
> _____
>
> Signature of defendant.
>
> "(2) Except in cases of minor offenses, the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel.

Demand for a judge to preside at a hearing. Parties have a right to a judge at a hearing on the formal calendar. MCR 3.912(B). MCR 3.903(A)(10) defines "formal calendar" as judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency proceeding. A judge must preside at a jury trial. MCR 3.912(A)(1). The right to have a judge sit as factfinder is not absolute, however. A party who fails to make a timely demand for a judge to serve as factfinder at a bench trial may find that a referee will conduct all further proceedings, and that the right to demand a judge has been waived.

MCR 3.912(B) states that a party may demand that a judge rather than a referee serve as factfinder at a nonjury trial by filing a written demand with the court. The demand must be filed within 14 days after the court has given the parties notice of their right to have a judge preside, or 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later. The demand must be made no later than 21 days before trial, but the court may excuse a late filing in the interest of justice.

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1).

The disqualification of a judge is governed by MCR 2.003. MCR 3.912(D).

Referees. MCR 3.913(B) states that unless a party has demanded a trial by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. Thus, if a referee tries a case, that same referee may conduct dispositional and dispositional review hearings even if the juvenile later requests that a judge preside at a hearing.

*See Chapter 12 for further discussion.

MCR 3.913(A)(2) and MCL 712A.10 specify the requisite qualifications of a referee. If a juvenile is charged with an offense that would be a criminal offense if committed by an adult, only referees who are licensed attorneys may conduct delinquency proceedings other than preliminary inquiries or preliminary hearings. The sole exception is for probation officers or county agents who were designated to act as referees by a probate judge prior to January 1, 1988, and were acting as referees at that time. MCL 712A.10(2).*

7.11 "Speedy Trial" Requirements

Delinquency cases. MCR 3.942(A) contains the "speedy trial" requirements for delinquency cases. That rule states:

> "In all cases the trial must be held within 6 months after the filing of the petition, unless adjourned for good cause. If the juvenile is detained, the trial has not started within 63 days after the juvenile is taken into custody, and the delay in starting the trial is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter."

There is no sanction stated in MCR 3.942(A) for violation of the 6-month rule.

Adjournments and continuances. "The power in a criminal case to grant or deny a continuance is within the sound discretion of the trial court. *People v Dowell,* 199 Mich App 554, 555 (1993) (trial court did not abuse its discretion in denying prosecutor's seventh request for continuance).

In criminal cases, four factors are important for determining whether a defendant is entitled to an adjournment:

- Is the defendant requesting the adjournment so that he or she may assert a constitutional right (e.g., the right to be represented by competent counsel)?
- Does the defendant have legitimate grounds for asserting this right (e.g., an irreconcilable *bona fide* dispute with counsel over whether to call alibi witnesses)?
- Is the defendant guilty of negligence for not having asserted this right earlier?
- Has the defendant caused the trial to be adjourned at other times? *People* v *Williams*, 386 Mich 565, 578 (1972), *People* v *Wilson*, 397 Mich 76, 81–83 (1976), and *People* v *Holleman*, 138 Mich App 108, 112–14 (1984).

MCL 768.2 states the following regarding stipulations for adjournments, continuances, or delays:

> "[N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." *Id.*

"Speedy trial" requirements when a motion for "traditional waiver" has been denied. In cases where the prosecutor has sought waiver of the court's jurisdiction and the motion has been denied, MCR 3.950(F) states that "[i]f the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter."

Motions for expedited trial on behalf of a victim. MCL 780.786a(1)(a)–(d) state that a "speedy trial" may be scheduled if the prosecuting attorney declares the victim to be one of the following:

> "(a) A victim of child abuse, including sexual abuse or any other assaultive crime.
>
> "(b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.
>
> "(c) Sixty-five years of age or older.
>
> "(d) An individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings."

Upon motion of the prosecuting attorney for a "speedy trial" in a delinquency case involving any of the victims described above, the court must set a hearing date on the motion within 14 days after it is filed. If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing. MCL 780.786a(2).

7.12 Closing Delinquency Proceedings to the Public

*Such a motion may be made at trial; it need not be made before trial.

MCL 3.925(A)(1) provides that, as a general rule, all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. However, MCL 712A.17(7) and MCR 3.925(A)(2) allow the court to close proceedings to the general public under limited circumstances. The court, on motion of a party or a victim,* may close proceedings to the general public during the testimony of a juvenile witness or a victim to protect the welfare of the juvenile witness or victim. In making such a decision, the court must consider:

- the age and maturity of the juvenile witness or the victim;
- the nature of the proceedings; and
- the desire of the juvenile witness, of the juvenile witness' family or guardian or legal custodian, or of the victim to have the testimony taken in a room closed to the public.

For purposes of MCL 712A.17(7) a "juvenile witness" does not include the juvenile against whom the proceeding is brought for a criminal offense. MCL 712A.17(8) and MCR 3.925(A)(2).

*See Section 25.2 for the criteria to determine who has "a legitimate interest."

If a hearing is closed under MCL 712A.17(7), the records of that hearing shall only be open by order of the court to persons having a legitimate interest. MCL 712A.28(2).*

7.13 Alternative Procedures to Obtain Testimony of Victim

A. Victims and Witnesses (Regardless of Age or Disability)

Under MRE 611(a), a trial court is given broad authority to employ special procedures to protect any victim or witness while testifying. MRE 611(a) provides:

> "(a) *Control by court*. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) *protect witnesses from harassment or undue embarrassment*." [Emphasis added.]

Unlike the statute discussed in the next section, MRE 611(a) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, MRE 611(a) contains no restrictions as to the specific type of procedures or protections that may be employed to

protect victims and witnesses. Some of these procedures may include the protections discussed in the next section, such as allowing the use of dolls or mannequins, providing a support person, rearranging the courtroom, shielding or screening the witness from the defendant, and allowing close-circuit television or videotaped depositions in lieu of live, in-court testimony.

In juvenile delinquency proceedings, the court may appoint an impartial person to address questions to a child witness as the court directs. MCR 3.923(F).

B. Protections for Child or Developmentally Disabled Witnesses

MCL 712A.17b(18) provides that the procedures in MCL 712A.17b are in addition to other protections or procedures afforded to a witness by law or court rule.

Pursuant to MCL 712A.17b(2)(a), the alternative procedures explained in this section may only be used when one of the following offenses is alleged:

- child abuse, MCL 750.136b;
- sexually abusive commercial activity involving children, MCL 750.145c;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; and
- assault with intent to commit criminal sexual conduct, MCL 750.520g.

In cases involving the foregoing offenses, special statutory protections apply to victim-witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled. MCL 712A.17b(1)(d).

MCL 712A.17b(1)(b) provides that "developmental disability" is defined in MCL 330.1100a(20)(a)–(b). If applied to a minor from birth to age five, "developmental disability" means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined below if services are not provided. MCL 330.1100a(20)(b).

If applied to an individual older than five years of age, "developmental disability" means a severe, chronic condition that meets all of the following additional conditions:

- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care;
  - receptive and expressive language;
  - learning;
  - mobility;
  - self-direction;
  - capacity for independent living;
  - economic self-sufficiency; and
- reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. MCL 330.1100a(20)(a)(ii)–(v).

A "developmental disability" includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, but does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 712A.17b(1)(a).

If the offense and age or disability requirements of MCL 712A.17b are met, a party or the court may move to allow one or more of the following measures to protect a witness.

Dolls or mannequins. The witness must be permitted to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. MCL 712A.17b(3).

Support person. MCL 712A.17b(4) provides that a child or developmentally disabled witness who is called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person must name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the

proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person must be filed with the court and served upon all parties to the proceeding. The court shall rule on a motion objecting to the use of a named support person before the date on which the witness desires to use the support person.

In *People v Jehnsen,* 183 Mich App 305, 308–11 (1990), the Court of Appeals held that the trial court did not abuse its discretion by allowing the four-year-old victim's mother to remain in the courtroom following the mother's testimony. Although the victim's mother engaged "in nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination," the trial court found no correlation between the mother's conduct and the victim's answers. *Jehnsen, supra* at 310. See also *People v Rockey,* 237 Mich App 74, 78 (1999) (where there was no evidence of nonverbal communication between the victim and her father, the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father's lap while testifying).

Rearranging the courtroom. A party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. If the court determines on the record that it is necessary to protect the welfare of the witness, the court shall order one or both of the following:

> "(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
>
> "(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand." MCL 712A.17b(15)(a)–(b).

In determining whether it is necessary to rearrange the courtroom to protect the witness, the court shall consider the following:

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses." MCL 712A.17b(10)(a)–(b).

Using videotape depositions or closed-circuit television when other protections are inadequate. The court may order a videorecorded deposition of a child or developmentally disabled victim-witness on motion

of a party or in the court's discretion. MCL 712A.17b(16) provides that if the court finds on the record that the witness is or will be psychologically or emotionally unable to testify even with the benefit of the protections set forth above, the court must order that a videorecorded deposition of a witness be taken to be admitted at the adjudication stage instead of the live testimony of the witness. The court must find that the witness would be unable to testify truthfully and understandably in the juvenile's presence, not that the witness would "stand mute" when questioned. See *People v Pesquera,* 244 Mich App 305, 311 (2001).

If the court grants the party's motion to use a videorecorded deposition, the deposition must comply with the requirements of MCL 712A.17b(17). This provision requires that:

- the examination and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- the court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

In order to preserve a juvenile's Sixth Amendment right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. See *In re Gault,* 387 US 1, 57 (1967) and *Pesquera, supra* at 309–10. In *Maryland v Craig,* 497 US 836, 855–56 (1990), the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e.,

> more than 'mere nervousness or excitement or some reluctance to testify'. . . ." (Citations omitted.)

See also *In re Vanidestine,* 186 Mich App 205, 209–12 (1990) (*Craig* applied to juvenile delinquency case).

In Michigan, in addition to the constitutional right to be present at trial and to confront witnesses, defendants in felony cases also have a statutory right to be "personally present" at trial. MCL 768.3. Similarly, juveniles have the right to be present at delinquency trials. MCR 3.942(B)(1)(a). In *People v Krueger*, 466 Mich 50, 53–54 (2002), the Michigan Supreme Court reversed defendant's CSC I and attempted CSC II convictions, concluding that the trial court violated his statutory right to be "personally present" at trial under MCL 768.3. The trial court removed defendant over his objection from the courtroom and made him watch his daughter's testimony via closed-circuit television. However, defendant was allowed to take notes while viewing the testimony and to confer with counsel during the one recess that was called. In addition, the trial court explained to the jury that defendant would not be present in the courtroom during the testimony, and that arrangements had been made so that defendant could view the testimony from another room. On appeal, defendant claimed that these procedures violated both his statutory and constitutional rights to be present at trial. The Supreme Court, after applying principles of statutory construction, which included applying the ordinary meaning of the words "personally" and "present," held that "[g]iven these definitions, there can be no doubt that when a defendant is physically removed from the courtroom during trial, he is not personally present as required by MCL 768.3. Under the facts of this case, the statute was violated." *Krueger*, *supra* at 53–54.

In *People v Burton,* 219 Mich App 278, 291 (1996), the Court of Appeals held that in extreme cases, allowing a victim-witness to testify in a criminal case via closed circuit television may not violate the defendant's rights of confrontation even though MCL 600.2163a* does not apply. *Burton* involved the savage sexual assault and beating of an adult victim who did not fall within the definition of "disabled" in the statute. The Court of Appeals found that where the victim is "mentally and psychologically challenged and the nature of the assault is extreme," the state's interest in protecting such victims may be sufficient to limit the defendant's right to confront his accuser face-to-face. *Id.* at 289. The Court of Appeals also added that the state's interest in the proper administration of justice warranted limitation of the defendant's rights of confrontation. The trial court found that the victim would have been unable to testify in the defendant's presence. Without use of closed-circuit television to present the victim's testimony, the victim's preliminary examination testimony would have been read into the record at trial, depriving the defendant of his right to cross-examine the victim. *Id.* The Court of Appeals concluded that the trial court properly found that use of the alternative procedure was necessary to preserve the victim's testimony and protect her from substantial mental and emotional harm. *Id.* at 290–91.

*MCL 600.2163a applies to criminal proceedings and is substantially similar to MCL 712A.17b.

C. Notice of Intent to Use Special Procedure or Admit Hearsay Statements

MCR 3.922(E) requires a party to file and serve a notice of intent to use a special procedure discussed in this section. This rule states:

(E) Notice of Intent.

> "(1) Within 21 days after the parties have been given notice of the date of trial, but no later than 7 days before the trial date, the proponent must file with the court, and serve all parties, written notice of the intent to:
>
> > (a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
> >
> > (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
> >
> > (c) use a videotape deposition as permitted by law.
> >
> > . . . .
>
> "(2) Within 7 days after receipt or notice, but no later than 2 days before the trial date, the nonproponent parties must provide written notice to the court of an intent to offer rebuttal testimony or evidence in opposition to the request and must include the identity of the witnesses to be called.
>
> "(3) The court may shorten the time periods provided in subrule (E) if good cause is shown.

7.14 Change of Venue

In delinquency cases not involving a waiver of jurisdiction, venue is proper where the offense occurred or where the juvenile is physically present. MCL 712A.2(a) and (d) and MCR 3.926(A).

MCR 3.926(D)(1)–(2) allow for change of venue in juvenile delinquency proceedings in two circumstances:

> "(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or
>
> "(2) when an impartial trial cannot be had where the case is pending."

"All costs of the proceeding in another county are to be borne by the juvenile court ordering the change of venue." MCR 3.926(D).

> **Note:** Prior to trial, a court in a county where an offense occurred may transfer a case to the juvenile's county of residence pursuant to MCR 3.926(B). In many jurisdictions, courts may agree that the court in the county where the offense occurred will retain jurisdiction for trial while the county of residence will pay the expenses of trial (witness fees, jury fees, appointed counsel fees, etc.).